no longer be attained. But this assumption as to the covenantee's object in securing the covenant would seem unwarranted by the facts, for in every case certainly a part of the object is to prevent the covenantor from using his property in other than the restricted manner; and furthermore, if the parties contemplated the changes upon unrestricted property of the neighborhood, it would seem that the whole of the object of the covenant was to restrain the action of the covenantor. The position as now taken by the Court of Appeals must find its true basis in considerations of policy, such as a desire to discourage the use of property for residential purposes in a business locality, or to render the restricted district available for the advancing needs of business.

But it would seem that no matter what view the Court finally adopts in determining when a change in the character of the neighborhood would justify a refusal to enjoin a breach of the restrictive covenant, a covenantor should never, because of such a change, be allowed to have the restrictive agreement delivered up and canceled, for it is quite possible that the neighborhood may resume its original character, and the covenant in that event again become valuable to the covenantee.[8]

RECORDING AS A VOIDABLE PREFERENCE.[1]—The Bankruptcy Law of 1867 provided that a conveyance, to be voidable as a preference, must have been made within four months before bankruptcy. Since the effect of recording acts is generally to make unrecorded instruments not void but at most inoperative as against all third parties,[2] it seems clear that a conveyance within their scope is "made" when executed; and that if executed more than four months, but recorded within four months before bankruptcy, it will be unassailable. This is the view taken by the majority of the cases,[3] and apparently the rule was so settled by a decision of the Supreme Court.[4]

The Act of 1898 defined a preference as suffering a judgment or making a transfer while insolvent, so as to enable any creditor to obtain more than his *pro rata* share;[5] and provided that if such prefer-

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[8]The case of St. Stephen's Ch. *v.* Ch. of Transfiguration (1911) 201 N. Y. 1, 6, is clearly distinguishable upon the ground that there the covenantee retained no land which could be beneficially affected by the enforcement of the covenant. *Cf.* Coudert *v.* Sayre (1890) 46 N. J. Eq. 386.

[1]The question of fraudulent conveyance is not treated here. Failure to record is, however, a badge of fraud. Clayton *v.* Exchange Bank (C. C. A. 5th Cir. 1903) 121 Fed. 630, *certiorari* denied (1903) 191 U. S. 567.

[2]As to the effect of the various recording acts, see 13 Columbia Law Rev. 539.

[3]*Ex parte* Dalby (D. C. D. Mass. 1870) Fed. Cas. No. 3540; Folsom *v.* Clemence (1873) 111 Mass. 273; *contra,* Bostwick *v.* Foster (C. C. D. Vt. 1878) Fed. Cas. No. 1682.

[4]Sawyer *v.* Turpin (1875) 91 U. S. 114; see Matthews *v.* Westphal (C. C. D. Ia. 1880) 48 Fed. 664; National Bank *v.* Conway (C. C. E. D. Va. 1876) Fed. Cas. No. 10037.

[5]Bankr. Act. (1898) § 60 (a).

ence were given within the four months' period to one having reasonable cause to believe that it was intended as such, it should be voidable by the trustee.[6] Again the great weight of authority held that the four months' period dated from the execution, and not from the recording, of the preferential transfer.[7]

The amendment of Feb. 5, 1903 makes the four months' limitation part of the definition of a preference, but also provides that where recording is required by the state law, the limitation shall not expire until four months from the date of such recording. This change in the statute gives rise to two new problems:—When is recording required by the state law; and, if it is, are the insolvency of the bankrupt, the "reasonable cause to believe," and the other elements of a preference to be considered as of the date of execution or of record?

There seem to be three possible interpretations of the word "required," and all three have some support in the authorities. The first is based partly on the fact that in §3, defining acts of bankruptcy, the phrase "required or permitted" to be recorded is used; that while the original draft of the amendment of 1903 contained similar language, the words "or permitted" were stricken out in Congress.[8] Its effect apparently is that recording is not "required" unless an unrecorded transfer is absolutely void.[9] Since practically no recording act goes to that extent, this interpretation renders the amendment nugatory. The second seeks to reconcile the decisions by distinguishing between recording acts which make unrecorded transfers void as against general creditors, and those which do not; holding that the former class "requires" recording, but the latter does not.[10] It is, however, impossible to reconcile all the decisions on this point;[11] and this interpretation, while tending to make the bankruptcy law symmetrical, seems to have no warrant in the language of the statute. The third view is the one taken in the recent case of *Carey* v. *Donohue* (C. C. A. 6th Cir. 1913) 209 Fed. 328, to the effect that where record is required to make a transfer valid against any class of persons, it is "required" within the meaning of the Bankruptcy Act; that the word "required" refers to the character of the transfer rather than to the effect of not recording

[6]Bankr. Act. (1898) § 60 (b).

[7]In Matter of Mersman (D. C. W. D. N. Y. 1901) 7 Am. Bankr. Rep. 46; see *In re* Noel (D. C. D. Md. 1905) 137 Fed. 694; *In re* Adams (D. C. E. D. Mich. 1899) 97 Fed. 188; *In re* Wright (D. C. N. D. Ga. 1899) 96 Fed. 187. One case, however, takes the position that a preference cannot be said to have been given until a conveyance valid against creditors has been perfected; that where, therefore, the recording act makes unrecorded transfers void even as against general creditors, the four months date from the recording of the preferential conveyance. *In re* Klingaman (D. C. S. D. Ia. 1900) 101 Fed. 691.

[8]1 Loveland, Bankruptcy (4th ed.) 994.

[9]See *In re* Jacobson & Perrill (D. C. N. D. Ga. 1912) 200 Fed. 812; *In re* McIntosh (C. C. A. 9th Cir. 1907) 150 Fed. 546; Meyer Bros *v.* Pipkin Drug Co. (C. C. A. 5th Cir. 1905) 136 Fed. 396.

[10]*In re* Sturtevant (C. C. A. 7th Cir. 1911) 188 Fed. 196; *In re* Sayed (D. C. W. D. Mich. 1910) 185 Fed. 962; *In re* Klein (C. C. A. 6th Cir. 1912) 197 Fed. 241; *In re* Mission Fixture & M. Co. (D. C. W. D. Wash. 1910) 180 Fed. 263.

[11]Collier, Bankruptcy (9th ed.) 799.

it. This view seems to be supported by the weight of authority;[12] and besides giving to the word "required" its natural meaning, it carries out the apparent purpose of the amendment to change the rule of the earlier cases.

Conceding the recording to be "required," it remains to be decided whether the statutory elements are to be determined as of the date of execution or of record. Since the amendment leaves the definition of a preference intact except as to the time requirement, it would seem that its effect should be merely to extend the time limitation, leaving the elements still to be considered as of the date of execution.[13] Many decisions, however, carry out the spirit of the amendment to its full extent by dating intent, reasonable cause and insolvency from the time of recording.[14] The amendment of June 25, 1910 is apparently intended to settle the law in favor of the latter view.[15]

STATE REGULATION OF REDUCED RATE RAILROAD TICKETS.—It is well settled that state railroad commissions may fix reasonable rates for intrastate transportation and control the incidents of the service.[1] Since discrimination between shippers is a familiar cause of industrial monopoly, it is to the public interest to have unvarying freight rates prescribed by the State.[2] But, obviously, the same rule of policy does not apply to passenger rates; consequently, commutation, mileage, and other desirable forms of cut-rate transportation, are exempt from the ban on discrimination.[3] The nature of this exemption has been the subject of much controversy. The Supreme Court has held that railroads cannot be compelled to issue cut-rate tickets, on the ground that since the maximum charge must, of course, be reasonable, any lower charge is less than reasonable in legal contemplation, and its enforcement becomes a taking of property without compensation.[4] The fallacy

[12] *In re* Beckhaus (C. C. A. 7th Cir. 1910) 177 Fed. 141; Loeser *v.* Savings Dep. Co. (C. C. A. 6th Cir. 1906) 148 Fed. 975; See English *v.* Ross (D. C. M. D. Pa. 1905) 140 Fed. 630; Ragan *v.* Donovan (D. C. N. D. Oh. 1911) 189 Fed. 138; Mattley *v.* Geisler (C. C. A. 8th Cir. 1911) 187 Fed. 970; Dulany *v.* Morse (1913) 39 App. Cas. (D. C.) 523.

[13] *In re* Klein, *supra;* Debus *v.* Yates (D. C. E. D. Ky. 1910) 193 Fed. 427; see *In re* Jackson Co. (D. C. D. Mo. 1911) 189 Fed. 636; *In re* Sayed, *supra;* Claridge *v.* Evans (1908) 137 Wis. 218.

[14] First Nat. Bank *v.* Connett (C. C. A. 8th Cir. 1905) 142 Fed. 33; English *v.* Ross, *supra; In re* Montague (D. C. E. D. Va. 1905) 143 Fed. 428.

[15] See *In re* Klein, *supra,* p. 250; but see *In re* Watson (D. C. E. D. Ky. 1912) 201 Fed. 962.

[1] Railroad Commission Cases (1886) 116 U. S. 307.

[2] 2 Wyman, Public Service Corporations, § 1290.

[3] Congress provides that nothing in the Interstate Commerce Act "shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets." 25 U. S. Stat. at L. 862. Since the States have not enacted similar clauses, their attitude is implied to be in line with that of Congress, because they grant their commissions the widest power over freight transportation and only limited power over passenger traffic. Georgia Code (1911) §§ 2634, 2664.

[4] Lake Shore & M. S. Ry. *v.* Smith (1899) 173 U. S. 684, 696.